STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Sawyer, Fitzgerald, and Donofrio, JJ.

RAQUEL RODRIGUEZ,

Plaintiff-Appellee,

and

PACIFIC EMPLOYERS INSURANCE,

Intervening Plaintiff-Appellee,

v

A.S.E. INDUSTRIES, INC.,

Defendant-Appellant,

and

AMERICAN AXLE & MANUFACTURING HOLDINGS, INC. and AMERICAN AXLE & MANUFACTAURING, INC., DESIGN SYSTEMS, INC., INNOVATIVE ENGINEERING, INC., and PMI MANAGEMENT GROUP, INC.,

Defendants.
_____/

Supreme Court
Case No. 133686

Court of Appeals
Case No. 263930

Wayne Circuit Court
Case No. 02-231906-CZ

BRIEF ON APPEAL

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BASIS OF SUPREME COURT JURISDICTION

This Court granted leave to appeal by order entered on October 12, 2007 from a published decision of the Michigan Court of Appeals.

QUESTIONS PRESENTED

I. **PURSUANT TO MCL 600.2946a(1), IS IT ERRONEOUS FOR A TRIAL COURT TO MAKE INDEPENDENT FINDINGS IN AVOIDANCE OF THE NON-ECONOMIC DAMAGES CAP *AFTER* THE JURY HAD MADE CONTRARY FINDINGS?**

Plaintiff-Appellee says:	NO
Defendant-Appellant says:	YES
The Trial Court said:	NO
The Court of Appeals said:	NO
Amicus Curiae says:	YES

II. **WHERE THE DAMAGES CAP OF MCL 600.2946a(1) APPLIES, MUST THE TRIAL COURT FIRST APPLY THE CAP TO THE JURY'S AWARD BEFORE APPORTIONING FAULT BETWEEN PARTIES AND NON-PARTIES?**

Plaintiff-Appellee says:	NO
Defendant-Appellant says:	YES
The Trial Court said:	NO
The Court of Appeals said:	----
Amicus Curiae says:	YES

STATEMENT OF FACTS

Note: for the following statement of facts, Amicus Curiae relies upon the statement in the opinion of the Court of Appeals.

Plaintiff was seriously injured in the course of her employment with defendant American Axle & Manufacturing, Inc.[1] Specifically, she was injured when her hair became entangled in the rollers of a conveyer system used at American Axle and manufactured by ASE Industries, Inc. The jury found in favor of plaintiff on her products-liability action against ASE. The jury further determined that ASE was 30 percent at fault for the accident and that American Axle was 70 percent at fault. Finally, while the jury found that ASE was not grossly negligent, the trial court found that ASE had actual knowledge that the product was defective and, therefore, declined to apply the damages limitations of MCL 600.2946a(1).

Defendant ASE appealed, plaintiff cross-appealed, and the Court of Appeals affirmed. The Court held that under MCL 600.2946a, "the Legislature created [a statutory scheme] that provides two independent bases to avoid application of the damages limitation." *Rodriguez v ASE Industries, Inc.*, 275 Mich App 8, 13 (2007). Further, the Court held that the "scheme is clear and unambiguous and, to give effect to both provisions, they must operate independently of each other, and the determination of the jury on the gross negligence issue cannot control the trial court's determination on the actual knowledge issue." *Id.* Having concluded that the damage cap of MCL 600.2946a(1) did not apply, the Court stated that "we need not address ASE's second issue regarding whether the damages limitation is to be applied before or after the reduction of the jury award for defendant's proportion of fault under MCL 600.2957 and MCL 600.6304." *Id.* ASE filed a timely application for leave to appeal, which this Court granted on October 12, 2007.

[1] At the time of the jury trial, Defendant American Axle was listed as a Non-Party at Fault, having already settled.

SUMMARY OF THE ARGUMENT

This case presents two issues relative to the construction and application of statutory provisions. The first issue on appeal is whether the trial court may substitute its decision for that of the jury pursuant to MCL 600.2946a, the product liability damage cap. The statute presents a Plaintiff with two means for avoiding the cap; first, a jury can find that a Defendant acted grossly negligently; or, the trial court could find that defendant acted with knowledge and willful disregard, thus precluding the defendant from relying the damage cap or other defenses. Based on the language of the statutes, there can be no dispute that pursuant to MCL 600.2946a(3) and 600.2949a, a trial court may make a substantive finding as a matter of law that a Defendant's actions were willful and made with knowledge such that the damage cap is inapplicable. However, the statute is silent as to when a trial court must make such a finding.

Based on Michigan jurisprudence, where a statute does not proscribe a procedure relative to its application, the Michigan Court Rules must govern. Based on the Michigan Court Rules, a request for summary disposition as to any substantive claim or defense must be made prior to trial. Additionally, even in the rare instances where a trial court may make a finding contrary to that of the jury based on a motion for judgment notwithstanding the verdict, the finding can only be on issues actually submitted to the jury and the trial court must overcome a high threshold. As the statute requires only gross negligence may go to the jury, for a trial court to make a finding after the jury's verdict on the issue of knowledge is procedurally defective and contrary to the statute and the court rules. Additionally, because a finding of knowledge and willful conduct precludes a Defendant from relying on numerous defenses at and before trial, it only follows that such a finding must occur prior to the trial.

The second issue on appeal is regarding damage computation if the damage cap does apply. Specifically, the issue is whether the damages cap should apply before or after apportioning fault in accordance with the jury's verdict. Based on the unambiguous language of MCL 600.2946a(1) requiring that the total amount of non-economic damages cannot exceed the damages cap, any jury award for non-economic damages must be capped before fault is apportioned. This interpretation is consistent with the statutory scheme relative to computation of damages and apportionment of fault. The Legislature has made clear that a Defendant may not be required to pay more than its share of fault. As the product liability statute and the apportionment of fault statutes are in *pari materia*, they must be read harmoniously. The product liability damage cap provides an absolute total amount which may be awarded in non-economic damages; MCL 600.2957 and 600.6304 provide the proecedure for apportioning fault, mandating that no Defendant shall pay more than its share. Construed together, the only plausible reading is that the cap must first apply to the total damage award, and then fault must be apportioned. Any other interpretation would render the damage cap meaningless, provide excess recovery in derogation of the statute, and would rewrite the statutes relative to damage calculation.

LEGAL ARGUMENT

I. AN INTERPRETATION OF MCL 600.2946a(3) WHICH PERMITS THE TRIAL COURT TO SUBSTITUTE ITS JUDGMENT FOR THE JURY'S VERDICT USURPS THE JURY'S FUNDAMENTAL FACT-FINDING POWER AND NULLIFIES VARIOUS COURT RULES AND STATUTES.

Standard of Review. "Statutory interpretation is a question of law that this Court reviews de novo." *Morales v Auto Owners Insurance Co,* 469 Mich 487, 490; 672 NW2d 849 (2003).

The first issue presented in the order granting the application for leave to appeal goes to the issue of statutory interpretation. Specifically, this Court's order granting leave permitted the parties to brief and argue what amounts to a procedural issue. In other words, this Court inquired

"whether the trial court properly made independent findings in avoidance of the cap on non-economic damages provided for in MCL 600.2946a(1) ***after*** the jury had made contrary findings." (Court's Order granting Leave) (emphasis added). This Order and the statutory language make clear that, while the trial court has the power to make a finding as a matter of law as to knowledge and willful conduct, it is unclear when the trial court must make such a finding. Based on the fact that the statute is silent on this procedural issue, coupled with the remainder of the statutory scheme relative to products liability action, it is apparent that a trial court may not make a finding which contradicts a jury's verdict pursuant to MCL 600.2946a.

A. While MCL 600.2946a Governs Substantive Legal Issues, its Silence on Procedural Matters Mandates that the Michigan Court Rules must Govern its Application which would not permit the Trial Court to Substitute its Judgment for that of the Jury.

The dispute in this matters centers around the interplay between MCL 600.2946a(1), (3) and MCL 600.2949a. As to issues of statutory interpretation, it is well established that the goal of statutory interpretation is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent, the words of the statute. *Neal v. Wilkes,* 470 Mich 661, 665; 685 NW2d 648 (2004). If the language of a statute is unambiguous, a court presumes that the Legislature intended the plainly expressed meaning and further judicial construction is neither required nor permitted. *Sun Valley Foods Co. v. Ward,* 460 Mich 230, 236; 596 NW2d 119 (1999).

In this case, the statutory provisions at issue, while substantively clear, are procedurally ambiguous. In relevant part, MCL 600.2946a(1) and 2946a(3) provide:

> (1) In an action for product liability, the total amount of damages for noneconomic loss shall not exceed $280,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital bodily

function, in which case the total amount of damages for noneconomic loss shall not exceed $500,000.00.[2]

* * *

(3) The limitation on damages under subsection (1) for death or permanent loss of a vital bodily function does not apply to a defendant if the trier of fact determines by a perponderance [sic] of the evidence that the death or loss was the result of the defendant's gross negligence, or if the court finds that the matters stated in section 2949a are true.

Based on the above statutes, in an action for product liability, non-economic damages are capped based on the type of injury. However, the Legislature, having envisioned a scenario where the Defendant may have acted in an unusually negligent or willful manner, prescribed a method wherein a Plaintiff may avoid the damages cap of § 2946a(1). Based on § 2946a(3), a Plaintiff may avoid the damages cap by demonstrating to a jury that the Defendant was grossly negligent. In the alternative, the Plaintiff may avoid the cap by demonstrating to the court the matters stated in § 2949a. MCL 600.2949a states:

> In a product liability action, if the court determines that at the time of manufacture or distribution the defendant had actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that is the basis of the action, and the defendant willfully disregarded that knowledge in the manufacture or distribution of the product, then sections 2946(4), 2946a, 2947(1) to (4), and 2948(2) do not apply.

The above statute provides a clear substantive framework for the trial court in deciding whether to make a finding, as a matter of law, of knowledge and willful conduct on the part of a Defendant. However, the statute is silent as to when the trial court must make this finding. Accordingly, this procedural silence triggers application of the Michigan Court Rules. It is well established that this Court has exclusive rulemaking authority with respect to matters of practice and procedure for the administration of our state's courts. Const 1963, art 6, § 5. Additionally,

[2] The $280,000 and $500,000 limits are adjusted annually.

where a statute and Court rule conflict on a matter of procedure, the Court Rule must prevail. *See People v McGuffey,* 251 MichApp 155, 165; 649 NW2d 801 (2002). In this case, the fact that statute is silent mandates that the court rules must govern.

While no court rule precisely addresses the issue presented herein, numerous court rules provide for the progression of a civil case. MCR 2.116 provides the procedure a party must follow when seeking judgment or partial judgment. Specifically, the rule places the burden on the party seeking dismissal or judgment to file a motion seeking such relief. Applicable to this type of case would be MCR 2.116(C)(10), wherein a party (in a case of this type, the Plaintiff) would ask the Court to find, as a matter of law, that no genuine issue of fact exists, and that the Court must find knowledge and willful conduct as stated in MCL 600.2949a. However, the Court rule makes clear that this type of Motion must occur **before** trial. MCR 2.116(G)(4) states that the non-movant opposing summary disposition "may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a **genuine issue for trial**." (emphasis added). While MCL 600.2946a(3) and § 2949a allow a trial court to make a substantive finding as a matter of law, such findings can only be made in compliance with the court rules. MCR 2.116 governing judgments as a matter of law is unambiguous in its requirement that a court's legal finding must occur prior to a trial.

MCR 2.116 is also especially instructive in this type of case where the trial court is called upon to make a legal ruling on the basis that no issues of fact exist on a particular claim. Based on the language of MCL 600.2946a(3), either a finding of gross negligence or willful conduct could lead to the avoidance of the damages cap. However, while each offer a distinct basis for avoiding the cap, to find either willful conduct or gross negligence one must rely on the same

predicate facts. Accordingly, even if gross negligence is an issue for the trier of fact, where pursuant to MCR 2.116(C)(10) a trial court finds no question of fact, disposition prior to a trial would be appropriate, further supporting the fact that any finding must occur before trial.

Also applicable to cases of this nature is MCR 2.610 governing post-trial motions for a judgment notwithstanding the verdict (JNOV). This rule is especially applicable relative to the issue in this case on whether a trial court may substitute its judgment for that of the jury pursuant to MCL 600.2946a and § 2949a. The rule allows a party, following a jury's verdict, to move the court for judgment notwithstanding the verdict on issues submitted and decided by the jury. This Court has held that the standard under a JNOV is high, such that "[t]he standard of review for judgments notwithstanding the verdict requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim [or defense] as a matter of law, should a motion for judgment notwithstanding the verdict be granted." *Orzel by Orzel v Scott Drug Co*, 449 Mich 550, 557-58; 537 NW2d 208 (1995) (internal citations omitted).

It is clear based on the standards applied to a motion for JNOV under MCR 2.610, that a trial court may not set aside a jury's verdict pursuant to MCL 600.2946a(3). First, a party may seek a JNOV on issues submitted and decided by the jury. Under § 2946a(3), the only question which may be submitted to the jury is regarding gross negligence, not regarding knowledge and willful conduct. Therefore, a party could, arguably, ask the court for JNOV relative to the issue of gross negligence which is decided by the jury. However, given the unambiguous nature of the statute, placing the issue of gross negligence within the purview of the jury, a trial court could not substitute its judgment for that of the jury's on the issue of gross negligence, unless it makes a ruling in accordance with MCR 2.116(C)(10) prior to a trial because no questions of fact exist.

Further evidence that a trial court could not grant a post-verdict judgment as to knowledge and willful conduct can be found in the standards applied to § 2946a(3) and § 2949a. The statute requires a jury to find gross negligence in order to avoid the effect of the statutory cap; however, the statute requires that the trial court must find: (1) the defendant had actual knowledge; (2) the product was defective; (3) there was a substantial likelihood that the defect could cause the injury alleged; (4) the defendant willfully disregarded that knowledge in manufacture or distribution. § 2949a. The standard is higher for a trial court than it is for a jury's finding; thus it would be virtually impossible for a trial court to find willful conduct where a jury, viewing all the same facts, finds no gross negligence, a lesser standard.[3]

An examination of the language of the statute makes clear that a trial court may make a finding, as a matter of law, as to whether the product liability damage cap may be avoided. However, while the statute is clear in this regard, it is silent as to when a party must ask the trial court to make this finding. Where this procedural issue is ambiguous in the statute, it must be governed pursuant to the Court Rules. Based on MCR 2.116(C)(10) and (G)(4) which require a legal disposition of a claim be made before trial, and MCR 2.610 which places a tremendous burden before a jury verdict may be set aside, it is clear a trial court may not substitute its findings of fact for those of the jury. However, in addition to the Court Rules governing this matter procedurally, a review of the product liability statutory scheme further supports the fact that a finding by a trial court based on MCL 600.2946a(3) must occur prior to trial.

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[3] *See Jennings v Southwood,* 446 Mich 125, 136-37; 521 NW.2d 230 (1994), defining "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Cf. Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982) defining "willful and wanton" as "conduct alleged shows an **intent to harm** or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does."

B. Due to the Fact that a Trial Court's Finding of Actual Knowledge and Willful Conduct Precludes a Defendant's Right to Various Statutory Defenses in Addition to Allowing a Plaintiff to Avoid the Damages Cap, it is Clear the Statute Intended that Any Legal Finding by the Trial Court Must occur prior to a Jury Trial.

As demonstrated above, in order to avoid the damages cap of MCL 600.2946a(1), a Plaintiff must either demonstrate knowledge and willful conduct to the Court or demonstrate gross negligence to a jury. However, in this case, both the trial court and the Court of Appeals ignored the full effect of finding knowledge and willful conduct. Specifically, by finding knowledge and willful conduct in accordance with MCL 600.2949a, the avoidance of the damages cap is not the only consequence for a Defendant. The fact that various other statutory defenses are waived is further evidence that the trial court must make a finding of knowledge prior to trial and not after a jury has rendered a verdict.

Guided by the statutory construction principles stated above, MCL 600.2949a provides that should a trial court find knowledge and willful conduct by a Defendant, "then sections 2946(4), 2946a, 2947(1) to (4), and 2948(2) do not apply." While the trial court, Court of Appeals, and Plaintiff have only acknowledged § 2946a relative to the damages cap, they have ignored the remainder of the sections enumerated as if superfluous. However, an examination as to the content of the various provisions demonstrates that a temporal limitation inherently exists which requires the trial court make a decision as a matter of law prior to trial.

The first provision listed under § 2949a is § 2946(4). The provision states:

> Sec 2946 (4) In a product liability action brought against a manufacturer or seller for harm allegedly caused by a product, there is a rebuttable presumption that the manufacturer or seller is not liable if, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm was in compliance with standards relevant to the event causing the death or injury set forth in a federal or state statute or was approved by, or was in compliance with regulations or standards relevant to the event causing the

> death or injury promulgated by, a federal or state agency responsible for reviewing the safety of the product. Noncompliance with a standard relevant to the event causing the death or injury . . . does not raise a presumption of negligence on the part of a manufacturer or seller. Evidence of compliance or noncompliance with a regulation or standard not relevant to the event causing the death or injury is not admissible.

The aforementioned provision provides the Defendant with a rebuttable presumption of non-liability if in compliance with certain standards. This provision, if applicable, would provide a basis for Defendant to move for summary disposition on all or part of a claim if through the course of discovery, a plaintiff is unable to overcome this presumption. Further, this presumption could serve as part of jury instructions aiding a Defendant's defense. However, if a trial court properly has ruled that § 2946a(3) and 2949a apply prior to trial, this would alter jury instructions, Defendant's strategy at trial, and lower Plaintiff's burden of proof. The fact that this defense is lost on a finding of knowledge and willful conduct is demonstrates that the trial court must make its finding prior to trial.

The next provision enumerated in § 2949a which is non-applicable upon a finding of knowledge and willful conduct is § 2947(1)-(4). In relevant part, this statute provides:

> Sec. 2947. (1) A manufacturer or seller is not liable in a product liability action for harm caused by an alteration of the product unless the alteration was reasonably foreseeable. Whether there was an alteration of a product and whether an alteration was reasonably foreseeable are legal issues to be resolved by the court.
>
> (2) A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.
>
> (3) A manufacturer or seller is not liable in a product liability action if the purchaser or user of the product was aware that use of the product created an unreasonable risk of personal injury and voluntarily exposed himself or herself to that risk and the risk that he or she exposed himself or herself to was the proximate cause of the injury. This subsection does not relieve a

> manufacturer or seller from a duty to use reasonable care in a product's production.
>
> (4) Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user.

This provision provides a Defendant to a product liability action with several additional defenses, many of which could be used to limit or even dismiss a claim summarily. Sections (1) and (2) reference alterations to a product and misuse. Where these provisions are applicable, a Defendant, through depositions, state and federal regulations, market standards, and other discovery could establish an absolute defense, especially where the statute requires the court to make the finding as a matter of law. Similarly, sections (3) and (4) provide additional defenses and place the burden on Plaintiff. These provisions likewise identify defenses and trial court actions which must take place prior to trial. The fact that the events in these provisions must occur before trial likewise indicates the temporal requirement that a finding of knowledge and willful conduct by the trial court must occur prior to trial.

The final provision enumerated in § 2949a as being waived by a Defendant found to have acted willfully and with knowledge is § 2948(2). This section provides:

> Sec. 2948. (2) A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

As with the prior provisions, this section provides Defendant with both a defense and a likely jury instruction where a plaintiff claims she was not warned of a danger. Again, this defense is foreclosed where a court has made a finding before trial such that a jury need not hear this information or receive an instruction.

The aforementioned provisions demonstrate a temporal limit on when a trial court may make a finding of knowledge and willful conduct as a matter of law. If a trial court could simply make a contrary finding after the jury has rendered its verdict, then the trial would be infected with irrelevant defenses, jury instructions, and unnecessary testimony. The fact that a finding of knowledge and willful conduct eliminates not only the damage cap but also defenses and jury instructions conclusively demonstrates that a trial court must make its finding before trial. Any other interpretation renders portions of the statutory scheme superfluous.

II. AN EXAMINATION OF MCL 600.2946a(1) IN CONJUNCTION WITH MCL 600.2957 AND 600.6304 REGARDING ALLOCATION OF FAULT MANDATES THAT IN CALCULATING DAMAGES, THE DAMAGES CAP MUST BE APPLIED FIRST BEFORE FAULT IS APPORTIONED.

Standard of Review. The Standard of Review is as stated in Section I, *supra*.

The second issue presented in this Court's October 12, 2007 order is relative to the calculation of damages in a product liability action. Specifically, this Court asked if, assuming the damages cap of MCL 600.2946a(1) applied, "whether the trial court properly applied the apportionment of fault between defendant and American Axle before applying the damages cap." (Order). Based on a review of the unambiguous statutory text, read in harmony with the allocation of fault statutes mandated in all actions alleging bodily injury, the proper method of calculating damages requires first applying the product liability cap and subsequently apportioning fault between the parties and non-parties in accordance with a jury's verdict.

The main issue presented herein is the proper reading and application of MCL 600.2946a(1). In relevant part, it states "[i]n an action for product liability, . . . the **total amount**

of damages for noneconomic loss shall not exceed $500,000.00[4]" adjusted annually for inflation. (emphasis added). Applying the plain language of the statute, the first step is to reform the jury's verdict to the statutory cap as the total amount cannot exceed the damages cap. Moreover, due to the statutory scheme adopted by the Legislature relative to the allocation of fault, § 2946a(1) cannot be read in a vacuum, and must be read in harmony with the remainder of the statutes relative to calculation of damages and allocation of fault.

It is a well established principle of statutory construction that statutes that relate to the same subject or share a common purpose are in *pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *People v Webb,* 458 Mich 265, 274; 580 NW2d 884 (1998). Additionally, if two statutes may be construed in a manner that avoids conflict, that construction should control. *Id.* The construction should give effect to each statute without absurdity or unreasonableness. *Ryan v Dep't of Corrections,* 259 MichApp 26, 30; 672 NW2d 535 (2003).

In this case, MCL 600.2946a(1) is in *pari materia* with MCL 600.2957 and 600.6304, statutes governing the allocation of fault. Specifically, MCL 600.2957 states in relevant part:

> Sec. 2957. (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.
>
> * * *
>
> (3) Sections **2956 to 2960 do not eliminate or diminish a defense or immunity that currently exists**, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a

[4] While the facts of the present case involve the higher damages cap in MCL 600.2946a(1), the proper interpretation of the statutes as set forth by amicus curiae would equally apply to the lower damages cap, which, in relevant part, includes the identical "total amount of damages" language.

> nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

By its clear language, § 2957 requires that a party's liability will be limited by its portion of fault. As interpreted by the Courts, "each tortfeasor will pay only that portion of the **total damage award** that reflects the tortfeasor's percentage of fault." *Smiley v Corrigan*, 248 MichApp 51, 55; 638 NW2d 151 (2001). Further, section (3) makes clear that any defense or immunity is not diminished by the allocation of fault. MCL 600.2949a(1) functions both as a defense and partial immunity to the extent that when it applies, the award must be reformed pursuant to the cap. Accordingly, in a product liability case, a defendant would have immunity or a viable defense to any damages awarded in excess of the cap. Reading MCL 600.2957 with MCL 600.2946a(1) supports the conclusion that the jury's award must first be reformed pursuant to the cap, thus providing the Defendant the defense to which it is permitted by the cap, then applying any allocation of fault (thus each tortfeasor pays only its portion of "the total damage award").

The above analysis is further supported by MCL 600.6304 relative to the allocation of fault. In relevant part, MCL 600.6304 provides as follows:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.
>
> * * *

> (4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), **a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1).** This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312. [emphasis added].

The above provision further bolsters the fact that the damage award must first be reduced in compliance with MCL 600.2946a(1) before fault is allocated. The statutory scheme is explicit that a Defendant should not be required to pay more than its share of liability. In order to ensure this Legislative mandate is effectuated, the only plausible reading of § 2946a(1) in conjunction with § 2957 and 6304 is that the statutory cap must be applied first. Assume a situation in which a jury returns a non-economic award of $5 Million for a Plaintiff against three Defendants, and apportions Defendant A 50% fault, Defendant B 25% fault, and Defendant C 25%. If the apportionment occurs prior to the application of the cap, then Defendant A must pay $2.5 Million dollars (50%) and Defendants B and C must each pay $1.25 Million (25% each). If the cap is applied subsequently to each Defendant, then the Plaintiff would receive the maximum statutory cap on damages from **each Defendant**, thus receiving not the damages cap but triple the amount. Assuming even more Defendants, Plaintiff could receive 4 or 5 times the cap. This is explicitly in derogation of § 2946a(1) which states "the **total amount of damages** for noneconomic loss shall not exceed" the cap.

It is anticipated that Plaintiff in this case, and likely future Plaintiffs, will argue that the above example is inapplicable where after apportioning fault before applying the cap, the damage total falls below the cap. However, the statute is written as written, meant to apply to all litigants involved in a product liability case. The statute places no discretion in the courts based on the facts of a particular case. Rather, the statute applies to all cases involving product liability

causes of action. Therefore, by applying the statute as written and applying the cap first to ensure that the "total amount of damages" is capped before apportioning fault, then the Legislative intent as gleaned from the language of the statute would be properly effectuated.

RELIEF REQUESTED

Amicus Curiae Michigan Defense Trial Counsel, Inc. requests that this Court reverse the decision of the Court of Appeals and order that the statutes be construed as stated herein.

Respectfully submitted,

By: _____

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